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No. 88-516

In The

Supreme Court of the United States

October Term, 1988

LIBERTY NATIONAL BANK AND TRUST COMPANY,

Petitioner,

v.

STATE OF NORTH DAKOTA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a national bank is subject to a state law which generally prohibits ownership of farm and ranch land by all corporations and which provides a somewhat shorter period than federal banking law for divestiture of land acquired by a corporation as security for indebtedness, in collection of debts, or by the enforcement of a lien or claim.

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STATEMENT OF THE CASE

North Dakota Century Code ch. 10-06 is North Dakota's corporate farming law, sometimes called an anti-corporate farming law. It originated through an initiated measure and was approved by the voters on June 29, 1932. Since that date, this law has been amended on several occasions. During the 1981 Legislative Session, a blanket prohibition on corporate farming in North Dakota was changed to allow limited corporate farming

under specified exemptions such as the exemption for family farm corporations.

N.D.C.C. § 10-06-01 provides that "[a]ll corporations, except as otherwise provided in this chapter, are prohibited from owning or leasing land used for farming or ranching and from engaging in the business of farming or ranching." N.D.C.C. ch. 10-06 goes on to provide various exceptions to this basic rule. One exception, found in N.D.C.C. § 10-06-13, states: "a domestic or foreign corporation may acquire farmland or ranchland as security for indebtedness, by process of law in the collection of debts, or by any procedure for the enforcement of a lien or claim thereon, whether created by mortgage or otherwise." N.D.C.C. § 10-06-13(4). This section further states that such land acquired pursuant to subsection 4 "shall be disposed of within three years after acquiring ownership, if the acquisition would otherwise violate this chapter." N.D.C.C. § 10-06-13(5).

The Attorney General for the State of North Dakota brought this action to N.D.C.C. § 10-06-13 to force the petitioner, Liberty National Bank and Trust Company, a national banking association (hereinafter referred to as "bank" or "Liberty National Bank"), to comply with the corporate law of the State of North Dakota by divesting itself of the farmland or ranchland it owned within the State of North Dakota in violation of N.D.C.C. ch. 10-06.

The North Dakota district court granted the bank's motion for summary judgment on August 3, 1987. The State appealed to the North Dakota Supreme Court on August 31, 1987. In a decision filed June 28, 1988, the North Dakota Supreme Court reversed the district court's decision granting summary judgment in favor of the petitioner.

At the commencement of this litigation, Liberty National Bank was the owner of a tract of farmland or ranch land (as "owner" is defined by N.D.C.C. ch. 10-06). It had acquired ownership of this tract of land on December 19, 1983, by warranty deed from Marvin D. Lutz and Stella M. Lutz.

The deed was apparently given to the bank by the Lutzes in order to avoid foreclosure of a mortgage. The bank leased the land to the Lutzes in 1985 and 1986 with an option to purchase. After the Lutzes advised the bank that they no longer had any interest in purchasing the property, the bank attempted to sell the property to others. The bank experienced difficulty in selling the property because neighbors of an adjacent landowner who had expressed interest in the property were reluctant to bid against the landowner. Subsequently, the land was sold to an investor from Washington, D.C.

SUMMARY OF ARGUMENT

This is not an appropriate case for review upon writ of certiorari because (1) this case does not present any important question of federal law, (2) the decision of the North Dakota Supreme Court is not in conflict with any decision of another state court of last resort or of any federal court of appeals, and (3) the decision below is consistent with this court's case law on federal preemption.

The State of North Dakota seeks to impose the requirements of its general corporate law on national banks which do business within the state. The particular

statute enforced, that prohibiting most corporate ownership of farm and ranch land, is one common to only a limited number of states in the Midwest and, consequently, a decision in this case would have little, if any, impact nationwide. Moreover, both state and federal statutes have similar purposes and differ slightly only in the means chosen to implement those purposes. Consequently, the case presents no important question of federal law.

As the North Dakota Supreme Court noted in its opinion, no other decisions on the issues presented in this case have been handed down by any state court of last resort and any federal court of appeals. Thus, there is no conflict in decisional law for this court to resolve.

Finally, the decision in the North Dakota Supreme Court is consistent with other case law permitting states to apply to national banks operating within their jurisdiction state law generally applicable to all persons and businesses. Thus, there exist no special or important reasons why this court should grant certiorari in this case.

ARGUMENT

Petitioner has failed in his petition to set out special and important reasons why this court should grant a writ of certiorari in this case. To the contrary, there are several substantial reasons why the petition must be denied.

I. THIS CASE PRESENTS ISSUES NARROW IN SCOPE AND OF LIMITED NATIONAL SIGNIFICANCE.

Since passage of the National Bank Act of 1864, a dual system of banking regulation has arisen in this country. On the one hand, there are state-chartered banks, which are creatures of individual state law and regulated by their respective state banking authorities. On the other hand, there are national banks, which are instrumentalities of the federal government and regulated by federal agencies, including the Comptroller of the Currency and the Federal Deposit Insurance Corporation.

For the most part, state-chartered banks must look to the law of the state in which they have their charter for the boundaries of permissible conduct. By contrast, national banks generally must look to federal statutes and regulations for what they may or may not do in the conduct of their banking operations. Nonetheless, state banks remain subject to general federal law affecting their operations and federal banks remain subject to state laws of general applicability.

For example, a state bank whose deposits are insured by the FDIC must follow applicable rules and regulations promulgated by the Corporation. So, too, are state banks subject to federal tax laws, occupational safety laws, employment security laws, as well as other federal laws. Their state charter, while freeing state banks from the requirements of the National Bank Act and other national banking laws, does not shield them from the other federal

legal obligations and duties that all commercial enterprises conducting operations within our nation's borders face as well.

Likewise, national banks, while unencumbered by state laws governing the conduct of banking operations within the state, are not shielded by virtue of their federal charter from complying with those state laws which are generally applicable to all persons and businesses conducting activities within the state. For example, a national bank can be compelled to pay a state tax on bank stock. *National Bank v. Commonwealth*, 9 Wall. 353 (1869). Similarly, a national bank is subject to state law regarding fraudulent conveyances. *McClellan v. Chipman*, 164 U.S. 347 (1896). In *McClellan*, the court acknowledged that although requiring a national bank to obey state laws of general applicability may impair the freedom of that bank to operate as it pleases, only those state laws which frustrate the Congress's purpose or impair the efficiency of a bank to discharge the duties imposed upon it by federal law would be subject to preemption. *Id.*

This case does not present substantial questions which go to the heart of the differences between these two parallel systems. Rather, it involves relatively minor gradations of difference in the choice of the means to implement essentially identical legislative objectives.

Petitioner asserts that the decision by the North Dakota Supreme Court "nullified" 12 U.S.C. § 29 in pursuit of the purposes and objectives of the North Dakota corporate farming statute. Petitioner also contends that such nullification presents a grave threat to the economic

viability of national banks. However, reports of the nullification of federal law and threats to the national banking system are greatly exaggerated.

Far from "nullifying" the federal statute, the North Dakota Supreme Court decision in this case merely carves out a very narrow area where the full sweep of the federal statute is limited by a slightly more restrictive state law provision of general applicability. The North Dakota Supreme Court reasoned that, in light of the essential congruity of the purposes and objectives of the two laws, permitting this slight limitation did "no violence to the purpose and objectives of the federal statute." *State of North Dakota v. Liberty National Bank*, 427 N.W.2d 307, 315 (N.D. 1988).

The decision left wholly unaffected the application of 12 U.S.C. § 29 to commercial and residential real property acquired by national banks. Neither is the effect of the decision on bank ownership of farm and ranch real property significantly different from the result under 12 U.S.C. § 29. The initial divestiture period is not eliminated entirely, but merely shortened from five to three years. Similarly, the provisions for extending the initial divestiture period are not eliminated, but rather more narrowly drawn, with consideration being given to the interests of the State of North Dakota as well as those of the bank.

Neither are the issues presented in this case of great national significance. State corporate farming statutes prohibiting or restricting corporate ownership of farm and ranch land exist in only a handful of states in the

Midwest.[1] There is no evidence of any national trend toward expanding this small group. Such expansion is unlikely for a number of reasons. States where these laws have been enacted are generally states with histories of agrarian, populist political activity. For the most part, states without laws restricting corporate farming are predominately urban. By reason of sheer numbers, the political influence of the family farm constituency in these states is substantially less than it is in the Midwestern states.

Moreover, these same urban states, because they currently permit corporate farming, are likely to have well-established, well-financed, and politically powerful constituencies currently involved in corporate farming and possessing a vested interest in the status quo.

Because the North Dakota Supreme Court's holding permits only minor differences in implementing essentially similar state and federal legislative objectives and because any impact of this decision is limited to states in a single geographic region, this case is not one that is appropriate for review upon writ of certiorari.

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[1] The following states have restrictions on corporate ownership of farm and ranch land: Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin.

II. THE DECISION OF THE NORTH DAKOTA SUPREME COURT DOES NOT DIRECTLY CONFLICT WITH ANY DECISION OF THIS COURT, ANY FEDERAL COURT OF APPEALS, OR ANY STATE COURT OF LAST RESORT.

This case does not offer any opportunity to resolve differences in decisions by any courts. Factually, this appears to be a case of first impression. Respondent's research in this regard reveals no cases where a federal court of appeals or a state court of last resort has ruled on issues similar to those presented here.

The closest case appears to be *Omaha Nat. Bank v. Spire*, 389 N.W.2d 269 (Neb. 1986). There a national bank brought a declaratory judgment action against the attorney general of the state of Nebraska seeking a declaration that the state's corporate farming law did not apply to national banks on the ground that the state law conflicted with 12 U.S.C. § 29. In that case, the court declined to decide whether Nebraska's five-year limitation on the holding of farm and ranch lands, without exception, was preempted by 12 U.S.C. § 29 because the question was "too theoretical to determine in a declaratory judgment action at this time." *Omaha Nat. Bank*, 389 N.W.2d at 284.

Neither does petitioner's brief cite any case where another court has even addressed the issue of the applicability of state corporate farming legislation to national banks. Much less does it cite any case where a federal court of appeals or other state court of last resort has expressed any view of the law in direct conflict with the decision by the North Dakota Supreme Court in this case.

The North Dakota Supreme Court noted in its decision the absence of any "on point" precedent saying,

"[w]e have been unable to find *any* decision addressing the precise issue before us." *Liberty Nat. Bank*, 427 N.W.2d at 314 (emphasis supplied).

Lacking case law on the issue of the application of corporate farming laws to national banks, petitioner argues by analogy this court's decision in *Fidelity Federal Savings and Loan Assoc. v. de la Cuesta*, 458 U.S. 141 (1982), to press its argument for certiorari. But, in addition to being distinguishable on its facts, *Fidelity* is clearly distinguishable from the instant case on the basis of the law applied. *Fidelity* was a case of express federal preemption articulated not by Congress, but by the Federal Home Loan Bank Board acting within a proper delegation of authority from Congress. *Fidelity* stands for the limited proposition that a federal agency in the reasonable exercise of authority given it by Congress may act to expressly preempt state law. *Fidelity*, 458 U.S. at 170. Since neither Congress nor the Comptroller of the Currency have expressed any intent to preempt state and corporate farming legislation, it is difficult to see how *Fidelity* can provide much guidance in the determination of this case.

III. THE DECISION OF THE NORTH DAKOTA SUPREME COURT FOLLOWS THIS COURT'S TEACHINGS ON FEDERAL PREEMPTION.

As pointed out by the North Dakota Supreme Court, federal preemption of state law can occur in three different ways: express preemption, intent to preempt implied by the pervasive nature of the federal regulatory scheme, or actual conflict between state and federal law. *Liberty Nat. Bank*, 427 N.W.2d at 309.

The record reflects no expression by Congress or the appropriate administrative agencies of any intent to pre-

empt the state corporate farming laws. For this reason, petitioner is left to argue both implied preemption and actual conflict. Petitioner is wrong as to both of these issues.

A. The Federal Regulatory Scheme is Not so Comprehensive or Pervasive as to Compel an Interference of Congressional Intent to Preempt State Corporate Farming Laws.

While it is true, as petitioner observes, that the National Bank Act does provide a comprehensive system for establishing national banks and governing their day-to-day conduct of banking business, neither the federal banking law nor any other federal law purports to regulate comprehensively, or otherwise, corporate ownership of farm and ranch land. Moreover, it is openly admitted by petitioner that, notwithstanding this comprehensive federal bank regulatory system, national banks remain subject to state law generally applicable to all persons and businesses.

Without doubt, any effort by the State of North Dakota to dictate standards for the extension of credit by national banks, for example, would fail. Likewise, a state law setting minimum capital requirements or check-cashing policies or loan loss amortization rules for national banks would also fail because such matters fall squarely within the system of federal regulation of national banks. However, state laws governing the ownership of farm and ranch land by all corporations, banking and non-banking alike, are different. Although those state laws do affect national banks in a limited way, the laws are not part of any system of federal banking regulation, but rather part of the state's general regulation of

agricultural activity pursuant to its police power. The federal government has no comparable system regulating ownership of farm and ranch land, comprehensive or otherwise. In that, corporate farming laws are not unlike the state regulation of fradulent conveyances approved by the court in *McClellan*.

B. There is No Conflict Between the Divestiture Requirement of North Dakota's Corporate Farming Law and the Restrictions on the Power of a National Bank to Hold Real Property.

As the court below correctly noted, there is no actual conflict for preemption purposes between 12 U.S.C. § 29 and North Dakota Century Code § 10-06-13. *Liberty Nat. Bank*, 427 N.W.2d at 314. Indeed, when one compares the federal and North Dakota systems respecting ownership of real property by national and state banks, one is struck by their similarity, not their differences. As to commercial and residential real property, both systems are the same. As in 12 U.S.C. § 29, N.D.C.C. § 6-03-09 provides for a maximum holding period of five years with discretionary extension by the appropriate regulatory authority. In the case of North Dakota, that authority is the Banking Commissioner.

The only difference between the state and federal laws is in the limited area of farm and ranch real estate. There, North Dakota law provides for an initial three-year divestiture period for property acquired through foreclosure or other security or debt satisfaction transactions while 12 U.S.C. § 29 calls for an initial five-year divestiture period. Similarly, North Dakota's corporate

farming law provisions for extending the initial divestiture period are more narrowly drawn than the corresponding federal banking law provisions. It is not physically impossible for a national bank to comply with both statutes. Divestiture within three years of acquisition complies with both statutes. Surely, the Comptroller would approve an extension of the divestiture period where the national bank had entered into a lease with option to purchase with the prior mortgagor thereby extending both time frames and permitting compliance with both state and federal law. And, of course, a timely contract of sale with the prior mortgagor would also satisfy the requirements of both statutes.

Because compliance with both statutes is physically possible, the search for actual conflict between these statutes must focus on whether or not the small differences embodied in the state statute stand as an obstacle to the purposes and objectives of Congress as embodied in the federal banking statute. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

But what kind of obstacle is sufficient to rise to the level of an actual conflict mandating preemption? State law is not preempted merely because it differs from a federal law. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

Rather, the differences must be of sufficient magnitude to support a finding of congressional intent to preempt the state law, notwithstanding the failure of Congress to directly express such an intent. Such a conclusion follows inevitably from the rule that preemption is not lightly to be presumed. *California Federal S & L Assn. v. Guerra*, 479 U.S. 272, 281 (1987). Thus, Congress

could not have intended any obstacle, however insignificant, unimportant, or indirect, would support a finding of preemption.

For the reasons articulated by the North Dakota Supreme Court, N.D.C.C. ch. 10-06 does not constitute an obstacle to the purposes and objectives sufficient to warrant preemption. Petitioner's argument that the decision by the North Dakota Supreme Court nullifies 12 U.S.C. § 29 is too broad. As indicated *supra*, 12 U.S.C. § 29 as it applies to national bank activities remains largely intact and unaffected by anything contained in N.D.C.C. ch. 10-06.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Dated this 28th day of October, 1988.

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